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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

LAS AMERICAS IMMIGRANT ADVOCACY CENTER; ASYLUM SEEKER ADVOCACY PROJECT; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; INNOVATION LAW LAB; SANTA FE DREAMERS PROJECT; AND SOUTHERN POVERTY LAW CENTER, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; WILLIAM BARR, in his official capacity as Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; AND JAMES MCHENRY, in his official capacity as EOIR Director of the United States, Defendants.	Case No. 3:19-cv-02051-IM BRIEF OF *AMICI* FORMER IMMIGRATION JUDGES AND MEMBERS OF BOARD OF IMMIGRATION APPEALS IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ORAL ARGUMENT REQUESTED

BRIEF OF *AMICI* FORMER IMMIGRATION JUDGES AND MEMBERS OF BOARD OF IMMIGRATION APPEALS

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TABLE OF AUTHORITIES

Cases

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Regulations

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But that is not how the immigration courts work today, and that is not the role that immigration judges have been directed to undertake. Instead, the immigration judge corps repeatedly is reminded by the EOIR Director and the Attorney General, of whom they serve and, therefore, where their loyalties should lie. Addressing a new class of immigration judges in March 2019, then-Deputy Attorney General Rod Rosenstein reminded the group that they are "not only judges," but also employees of the Department of Justice, and members of the Executive branch. As such, Rosenstein admonished them to "follow lawful instructions from the Attorney General, and . . . share a duty to enforce the law."[1] EOIR and Department of Justice memos recently obtained through a Freedom of Information Act request also demonstrate bias in the hiring process of new immigration judges and appellate immigration judges, affording preference to individuals with government backgrounds and, for appellate immigration judges, preference to immigration judges with high denial rates.[2]

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Pinocchios. The effect is more pernicious when considering all four claims together, which is an argument for Three Pinocchios."[7]

Unsurprisingly, there have been calls for the creation of an independent immigration court for decades.[8] Now more than ever, it is clear that an immigration court system controlled by the Attorney General is both unsustainable and fundamentally unfair. The Attorneys General serving the present administration systematically have attempted to erode due process and neutrality under the guise of efficiency, with the goal to incentivize deportation orders.[9] They have responded to criticism of such efforts from the immigration judges themselves by seeking to decertify the NAIJ.[10] The impact of such efforts is reflected in the above-cited circuit court decisions.

Under the current administration, EOIR has imposed on the immigration courts a series of policies that have even further undermined immigration judges' independence and neutrality.

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7 Salvador Rizzo, *Fact-Checking the Trump Administration's Immigration Fact Sheet*, WASHINGTON Post (May 10, 2019), available at https://www.washingtonpost.com/politics/2019/05/10/fact-checking-trump-administrations-immigration-fact-sheet/.

8 *See, e.g*

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A. THE ATTORNEY GENERAL AND EOIR DIRECTOR HAVE EXTENSIVE POWER OVER IMMIGRATION JUDGES, CREATING A SYSTEM THAT LACKS INDEPENDENCE.

Immigration

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each immigration judge complete at least 700 cases per year to receive a satisfactory performance review. The result of the performance metrics is to force immigration judges to cut corners, to push them to adjudicate cases more quickly, and to incentivize deportation orders. NAIJ repeatedly has pushed back on the performance metrics, urging that a one-size-fits-all approach is inappropriate for immigration judges who are supposed to be impartial arbiters in immigration cases.[12] In response, the administration has sought to decertify the union.[13]

Although Director McHenry has stated that the case quota was set after isMo

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each designated category.[15] The dashboard acts as a real-time reflection of the judge's performance, reminding the judge to complete cases within expedited timeframes and adjudicate motions expeditiously. If they fail to meet their performance metrics, the judges may be subject to discipline, reassignment, or even termination. The performance metrics thus actively disincentivize judges from issuing continuances, require that all asylum cases be expedited, irrespective of a

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particularly true today, as pro bono legal service providers are overwhelmed by the current immigration court case load, recently reported as consisting of 1.4 million cases.[17]

Requiring judges to complete cases within 60 days reduces the likelihood that detained individuals will obtain representation, which also significantly reduces the likelihood that they will receive a favorable outcome in their case. A comparison of asylum denial rates in immigration court from Fiscal Years 2012 through 2017 by Syracuse University's TRAC Immigration research center showed a 26.7 percent difference in denial rates between unrepresented (95.1 percent) and represented (68.4 percent) asylum seekers from Guatemala. For asylum seekers from China, the difference in denial rate for unrepresented (78.7 percent) and represented (17.7 percent) asylum seekers was sixty percent.[18]

Many detained respondents in removal proceedings also request continuances to obtain documents to support their cases. Thousands of noncitizens in immigration detention have no criminal background, are seeking protection from persecution, and do not speak English.[19] Gathering documents, while representing oneself from ha t

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Although many families appear if they are given a second opportunity to do so, most immigration judges do not afford them that opportunity. The expedited docket does not allow the judges the time to investigate reasons for respondents' failure to appear, but instead pushes them to issue removal orders *in absentia* to meet their performance goals.

3. Treatment of Unaccompanied Minors

The agency's prioritization of speed over due process extends to its treatment of unaccompanied minors appearing in immigration court. In December 2017, Attorney General Sessions issued a memorandum ordering IJs to adhere to the principles that the "timely and efficient conclusion of cases serves the national interest," "efficient and timely completion of cases and motions before EOIR is aided by the use of performance measures," and "any and all suspected instances of fraud should be promptly reported."[26] Fifteen days later, EOIR's Chief Immigration Judge released a memorandum specifically addressing minors who appear in

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a. Decisions limiting docket management tools

One major change in immigration court policy carried out through a certified decision of the Attorney General was the elimination of administrative closure, a crucial docketing tool used by immigration judges to prioritize active cases by removing from their active calendars cases with pending applications for seeking collateral immigration benefits that judges lack jurisdiction to adjudicate.[32] Administrative closure was also used in other special circumstances, including where the Department of Homeland Security (DHS), the prosecutor in immigration court, exercised its prosecutorial discretion not to pursue removal proceedings. In a system where there is now a backlog of over one million cases, judges relied on administrative closure as a tool to manage their dockets. On May 17, 2018, the Attorney General published *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (AG 2018), in which he eliminated administrative closure as a docketing tool in all but very limited circumstances. 27 I. & N. Dec. at 271 (Holding that "immigration judges and the Board may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action.").

In addition to the decision's impact on judges' independence and ability to manage their dockets, *Matter of Castro-Tum* had a direct and notable impact on the judge who originally heard the case. A highly respected immigration judge in Philadelphia, Steven Morley, issued the eCastro-Tum had entered the United States as an unaccompanied minor. After his release from detention, he did not appear for his immigration proceedings. Judge Morley was concerned,

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[32] DHS maintains sole jurisdiction to adjudicate immigrant visas and certain waivers. For example, where a noncitizen in proceedings before the immigration court marries a U.S. citizen, it is DHS (and not the immigration judge) that must adjudicate the resulting immigrant visa application.

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based on his past experience, that Immigration and Customs Enforcement (ICE) had provided the court with an inaccurate address for the youth. Judge Morley thus felt it would be unfair to order him removed *in absentia* without first determining if he had received proper notice of the hearing, as required by law.

On remand, the Attorney General directed Judge Morley to proceed according to the section of the law that governs *in absentia* orders. That section also requires a finding of proper notice.[33] Judge Morley proceeded consistently with the Attorney General's order by granting

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such a statement would have to recuse him or herself from the case. However, the Attorney General neither felt the need to be impartial, nor was he held accountable for his bias.[37]

Both issues—procedural irregularity and perceived bias—were raised in briefs submitted to the Attorney General, who brushed them aside in his decision. *Matter of A-B-*, 27 I. & N. Dec. at 324–25. Regarding the issue of bias, the Attorney General wrote that there is no "requirement that an administrator with significant policymaking responsibilities withdraw from 'interchange and discussion about important issues,'" adding "[i]f policy statements about immigration-related issues were a basis for disqualification, then no Attorney General could fulfill his or her statutory obligations to review the decisions of the Board." *Id*. at 325.

The next problem involved the BIA. Although the decision in *Matter of A-B-* did not preclude all victims of domestic violence from being granted asylum, the BIA chose to apply it that way, categorically denying pending asylum appeals that had relied on *Matter of A-R-C-G-*'s analysis without engaging in the individualized factual analysis required in such cases. Furthermore, there was no consideration by the BIA as to whether *Matter of A-B-* could properly be applied retroactively. It would seem that if *Matter of A-B-* was viewed as a policy shift undertaken by the Attorney General, it could be applied only to future cases. Even if applied retroactively, cases that were decided before *Matter of A-B-* should have been remanded to the Immigration Judge for a full hearing on the merits of the asylum claim.

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particular social groups under the *A-R-C-G-* standard) should have been remanded to allow respondents to reformulate their analysis and/or provide additional evidence or arguments in response to the superseding precedent.

The recent precedent decision of the U.S. Court of Appeals for the First Circuit in *De Pena Paniagua v. Barr*, No. 18-2100, 2020 WL 1969458, – F.3d – (1st Cir. Apr. 24, 2020), contains two additional points worth noting here: (1) in its rejection of the proposed particular social group, "*A-B-* itself cites only fiat"; and (2) nothing in *A-B-* provided "justification for categorically rejecting such a group without further consideration of the, parti2.918 (rt)-5 50 Td Tc 0.000.004

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